IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

A.O. NO. 23 OF 2001

M/s Bulk Carrier .....Appellant.

Versus

Smt. Manjeet Kaur and others. .....Respondent

Arvind Vashisth, counsel for the appellant.
K.K. Shah, counsel for the respondents.

HON'BLE RAJESH TANDON J.

By the present Appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant has challenged the order dated 15th May, 2000, by which the compensation has been awarded to the time of Rs. 1,50,000/- with interest at the rate of 11% per annum.

Briefly stated, the facts giving rise to the present appeal are that on 29th July, 1997, the deceased Sri Jagjit Singh was going from Village Lalpur to Kichchha on his Motor Cycle No. UP04-4201 and reached in front of Chandra Farm at about 9 a.m., then a tanker truck bearing No. UMM-59 came from being driven by its driver quite rashly and negligently and dashed Sri Jagjit Singh at wrong direction. He fell down alongwith his motor cycle, he was seriously injured and was shifted to Primary Health Centre, Kichchha. Looking to the seriousness of the injuries, he was again referred to Mission Hospital, Bareilly where he was medically examined including CAT Scanning and instant operations but unfortunately he could not survive and succumbed to his injuries.

According to the claim petition, the deceased was aged about 45 years at the time of the accident and was an agriculturist by profession having 60 acres of land on Batai and was doing the

agriculture and from it he was earning Rs. 10.000/- per month. According to the case of the appellant, the major portion of the income was being spent in his family. He was married and his wife is a young widow, who has been deprived of the family and matrimonial pleasure and comfort, while the claimant no. 2 and 3, who were the minor children of the deceased, who have deprived of the shed of love of his father, which he has left. The compensation has been claimed to the extent of Rs. 10.00,oo0/-

The claim petition was contested by the Bulk Carrier i.e. the owner and by the Insurance Company as well. It was come on the record that the tanker No. UMM-59 was being driven by a licenced driver and was within the provision of the policy condition and was insured with the National Insurance Company Ltd., on the relevant date the cover note no. 615320 was in force with effect from 25th of March, 1997 to 24th of March, 1998, hence, according to the owner, he was not liable to pay the amount.

The Insurance Company has also filed a Written Statement and this fact was admitted that Vehicle No. UMM-59 has been insured by the answering respondent by the Policy No. 451301/63/11/3656 and the policy was effective from 25th of March, 1997 to 24th of March, 1998.

On the pleadings of the parties, the Claims Tribunal has framed as many as five issues.

So far as the Issue No. 1 is concerned, the finding was recorded ion the basis of the evidence of PW 2 Sant Singh and PW 3 Pritam Singh, who are the ocular witnesses of the accident at the time of accident. Both were riding on their own separate Motor Cycles behind Sri Jagjit Singh, the deceased. They have deposed that the Tanker driver was driving the same very rashly and negligently and being on wrong side. These witnesses took the injured to the Kichchha Hospital and sent the information of the accident to his home. The FIR under Section 279/304, 427, IPC lodged under

Crime Case No. 356 of 1997 at P.S.Kichchha against the Truck Tanker Driver. Later on when the injured succumbed to his injuries, the post mortem was also conducted.

It was, therefore, wholly proved from the evidence on the record that the Truck Driver was driving the vehicle very rashly and negligently.

Issue No. 2 was framed with regard to the third party insurance, the same was also decided in favour of the petitioner against the opposite parties, while deciding the issue no. 3 as to whether the Truck Driver had any valid licence at the time of the accident. The Tribunal has taken into account, the evidence on behalf of the Bulk Carrier, who is the owner of the Truck Tanker No. UMM-59, who has deposed that the Truck was driven by a qualified Driver having a valid driving licence and the name of the Driver was Sri Prem Narain. The Photostat copy of the driving licence is also on the record. His prosecution papers were also put up on record.

The Claims Tribunal has, therefore, also recorded a finding that the photocopy of the Driving Licence was issued by the Licencing Authority on 17th July, 1975.

However, the Claims Tribunal has wrongly decided that since the Truck Tanker Driver had no valid licence at the time while driving the Tanker in question. This issue was decided in favour of the claimants against the owner.

While deciding the Issue No. 5, the claims tribunal has held that a sum of Rs. 1,50,000 should be awarded to the claimant.

While deciding this issue, the Tribunal has taken into consideration the age of the deceased, who was 45 years of age, the earning has been conclude to Rs. 10,000/-, which comes to Rs. 12,000/- and taking into account the age of the deceased, the amount of Rs. 1,50,000/- is wholly justified.

The sole contention of the petitioner is that since the Vehicle was insured and driver had a valid licence, there is n0 occasion to extend the liability upon the owner as the Vehicle in question was comprehensively insured with the National Insurance Company Ltd., He has also relied upon the judgment of the Apex Court reported in National Insurance Company Ltd. Vs. Swarna Singh SCC 297.

The Apex Court in the case National Insurance Co. Ltd. vs. Swaran Singh and others (2004) 3 SCC 297, has held as under:

110. *The summary of our findings to the various issues as raised in these petition is as follows:*

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver , as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defence available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly

licensed driver or one who was not disqualified to driver at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defence available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) if a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accident involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the

Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of he claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arriver at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money fond due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provision contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defence of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and

circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

In view of the aforesaid findings, the Insurance Company cannot be allowed to escape the liability form the payment of the amount. Since the amount awarded by the Tribunal has already been paid to the Claimant, the matter is remanded back to the Claims Tribunal for deciding the matter in the light of the judgment of the Apex Court in the case of Sri Swarna Singh as well as the observations made above.

The matter is remanded back to Claims Tribunal for deciding the liability of the owner as well as Insurance Company in the light of the judgment of the apex court as well as the observations made above. The amount which has already been given, shall not be recovered from the claimant.

However, after fixing the liability, it will be open for the Insurance Company to reimburse the amount to the claimant.

Appeal is partly allowed. No order as to costs.

05.10.2004 **(RAJESH TANDON, J.)**

P.S. Rathour